STATE OF MICHIGAN

COURT OF APPEALS

J.D.'s PUB & GRUB, INC., Plaintiff-Appellee,	UNPUBLISHED August 8, 2006
v	No. 256634 Wayne Circuit Court
NORTH POINTE INSURANCE COMPANY, Defendant-Appellant.	LC No. 03-304726-CK

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the court's denial of its motion for summary disposition and grant of summary disposition to plaintiff under MCR 2.116(C)(10). We affirm.

I

Charles Cross was the legal title owner of commercial property destroyed in a fire. Cross obtained title to the property after assuming an existing land contract for $400,000. The land contract required Cross to obtain insurance in the name of the seller for the premises and personal property. Pursuant to paragraph 8, subsection b, any insurance proceeds were to be applied in the following manner:

> Unless the seller and the purchaser otherwise agree in writing, the insurance proceeds shall be paid to the parties jointly and shall be applied to the restoration or repair of the damaged premises and personal property, if the restoration or repair can be completed for the amount of the insurance proceeds. If the restoration or repair cannot be completed for the amount of the insurance proceeds or if the value of the repaired property will not exceed the amount of the insurance proceeds, the insurance proceeds shall be applied to the principal, accrued interest, and all other amounts owed under this contract, whether or not these amounts are due yet, with any excess paid to the purchaser.

Effective June 21, 2001, Cross, as the land contract vendor, obtained an insurance policy from North American Capacity Insurance Company (North American). The policy covered the building, business personal property, and the personal property of others in or near the building. Plaintiff, the land contract vendee, was not a named insured on the North American policy.

On June 28, 2001, defendant received by facsimile from its agent plaintiff's application for insurance. The application did not identify Cross as an interested party. However, the agent's facsimile transmittal sheet included a request to add Cross as a named insured. For reasons that are not entirely clear from the record,[1] Cross was not named as an insured on the original policy issued by defendant. The policy issued covered bodily injury and property damage, personal and advertising injury liability, and medical payments. The policy also contained an "other insurance" clause which allowed defendant to pay a proportional share of a covered loss if a named insured or loss payee had "other insurance subject to the same plan, terms, conditions and provisions" as the insurance under the policy. On September 21, 2001, defendant issued an amended policy purporting to be effective September 2, 2001 which added Cross as a named insured. The policy was issued with limits of $325,000 for building, $100,000 for personal property, and $60,000 for business income.

On September 19, 2001, a fire occurred on the property, causing estimated damages to the building in the amount of $467,000. North American paid Cross $274,000, which Cross applied to the outstanding balance of the land contract, reducing the amount owed by plaintiff from $299,000 to $25,000. Plaintiff paid the remaining balance and obtained the deed to the property. Meanwhile, under its interpretation of the terms of 'the other insurance clause," defendant tendered a prorated amount of $180,122.74 as payment under the property damage provision of the contract, substantially below the $325,000 policy limit and the building's $467,000 estimated damage.[2]

Plaintiff filed a complaint in circuit court, seeking payment of the remaining $144,877.26 of coverage under the policy, plus penalty interest pursuant to Michigan's Uniform Trade Practices Act, MCL 500.2006. The parties filed cross-motions for summary disposition, and a hearing was held on May 7, 2004. Plaintiff argued, and the trial agreed, that proration was improper under the express terms of defendant and North American's policies. The trial court rejected defendant's argument that, because plaintiff was free and clear of the land contract by virtue of North American's payment to Cross, any additional payment for rebuilding would constitute a windfall for plaintiff. In addition, the trial court expressly rejected defendant's contention that the "Loss Payment" provision[3] precluded any additional payment as one in excess of plaintiff's financial interest. The trial court entered a judgment in favor of plaintiff for $183,836.93, $144,827.26 representing the balance of the building proceeds owed under the

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[1] The lower court record reflects that defendant attributed the omission to an "oversight" occurring because of plaintiff's failure to pay a premium payment, subjecting the policy to cancellation status and thereby preventing any changes in the policy until payment was received.

[2] North Pointe tendered full payment for plaintiff's losses under the business personal property and business interruption coverages. This appeal only concerns defendant's prorated payment for damage to the building.

[3] The "Loss Payment" provision provided:

> d. We will not pay you more than your financial interests in the Covered Property.

limits of the policy, and $39,009.61 in penalty interest. The trial court denied defendant's motion for reconsideration. Defendant now appeals.

II

This Court reviews de novo circuit court decisions granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Question of statutory interpretation are also reviewed de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003), rev'd on other grounds 468 Mich 29 (2003).

III

Defendant argues the trial court erroneously ignored the "other insurance" clause contained in plaintiff's policy. Defendant contends the clause applies given that two policies of insurance, maintained respectively by plaintiff and Cross, covered the same property and the same risk. We disagree.

A court must give the contractual language of an insurance policy its plain meaning. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). Each term should have meaning and a court should avoid reading ambiguity where none exists. *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 445 Mich 558, 567; 519 NW2d 864 (1994), rev'd on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

Here, the "other insurance" clause provides:

> **G. OTHER INSURANCE**
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> 1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.

As is clear from a side by side comparison of defendant's policy with the North American policy, the terms of the two polices are sufficiently distinct such that they do not have the same plan, terms, conditions and provisions. The North American policy did not identify plaintiff as a named insured or loss payee, but instead, identified Charles Cross and his business partner William Cross in that capacity. The North American policy coverage included the building, business personal property, and the personal property of others in or near the building. In contrast, the scope of the policy issued by defendant included bodily injury, property damage, personal and advertising injury liability, and medical payments. Unlike North American, defendant's policy covered both lost business personal property and business interruption and further provided for full replacement coverage whereas the North American policy provided for 90% coinsurance replacement cost. Defendant in fact paid in full for lost business personal property and business interruption without attempting to prorate under the coinsurance clause.

While the policies may overlap in limited respects, the policies viewed as a whole, offered coverage under differing plans, with different terms, conditions and provisions.

We also reject defendant's assertion that the "other insurance clause" applies here because both policies covered the same property. In *Lubetsky v Standard Fire Ins Co*, 217 Mich 654, 654-656; 187 NW 260 (1922), the Supreme Court rejected a similar argument:

> ' "A provision in a policy that in case of any other insurance on the property insured, made prior or subsequent to the policy, the assured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property." ' [*Id*. at 656 (citations omitted).]

Similarly in this case, while both policies "covered" the same property, they did not both cover the same interest in the property as they were not payable to the same parties, the plaintiff was not identified in the first policy, and privity of contract existed only between plaintiff and defendant. *Id.* See also, *McCoy v Continental Ins Co*, 326 Mich 261, 270; 40 NW2d 146 (1949) (where several fire insurance policies cover different interests in the same property, loss may not be prorated among the insurers). Nor is the fact that Cross was a named insured on the policy issued by defendant controlling. "[A] vendor and [a] vendee, respectively, in a land contract have separate and distinct insurable interests. *Id.* at 269.

Next, in reliance on the "Loss Payment" provision which limits any payment for loss to plaintiff's "financial interests in the Covered Property," defendant argues plaintiff's recovery is limited to the "equity in the premises." Since plaintiff had paid only $101,000.00 on the land contract at the time of the fire, the balanced owed was $299,000.00. Defendant contends that because Cross applied the payment he received from the North American policy to the balance owed under the land contract, thereby canceling plaintiff's remaining debt under the contract, payment on the building up to the limits of its policy would constitute an inappropriate windfall to plaintiff. We disagree.

Resolution of this issue is dependent on the meaning and use in the policy of the undefined term "financial interest." "Where a term is not defined in the policy, it is accorded its commonly understood meaning." *City of Grosse Pointe Park v Mich Mun Liab & Prop Pool*, 473 Mich 188, 199; 702 NW2d 106 (2005), citing *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). "Financial" is commonly understood to pertain or relate to "money matters; pecuniary." Random House Webster's Dictionary (2d college ed, 1997). " Interest" may be understood to pertain to:

> . . . . 5. a business, cause, *etc*., in which a person has a share, concern or responsibility. 6. a legal share, right, or title, as in the ownership of property or in a business undertaking . . . . [*Id*.]

Contrary to defendant's argument, because plaintiff had an ownership interest in the property, its financial interest in the property was greater than its equity interest and included the value of the property as reflected by the total sale price. In *Singer v American States Ins*, 245 Mich App 370, 380; 602 NW2d 367 (2001), the Michigan Supreme Court held:

> It is undisputed that [the plaintiff] insured the whole property, not simply the amount that she owed under the land contract. Therefore, the amount for which defendant is liable depends on each parties' interest in the property, not any amount still owed under the land contract.

Defendant offers no persuasive contrary interpretation of the term "financial interest," and offers no case law supportive of its argument.[4] Accordingly, the trial court did not err in awarding the balance of the building proceeds owed under the policy.

Finally, defendant contends the trial court erred in awarding plaintiff statutory penalty interest. We disagree. The trial court rendered its award under Michigan's Uniform Trade Practices Act, MCL 500.2006, which provides in relevant part:

> (1) A person must pay on a timely basis[5] to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice *unless the claim is reasonably in dispute.*
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> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith

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[4] Defendant misreads *Singer*, *supra* at 376-377, and quotes the case out of context. In *Singer*, this Court remanded to the lower court for determination of the benefits to which the plaintiff was entitled, with consideration given to the actual value of the property at the time of the fire, the cost of repairing or replacing the damaged dwelling and whether the plaintiff actually repaired or rebuilt the damaged dwelling to ascertain the plaintiff's interest. However, *Singer* quoted directly to *Wilson*, *supra* at 344, for the proposition that parties' interest in the property and not the amount still owed under the land contract determined the extent to which the insured was entitled to coverage.

[5] Under MCL 500.2836(2), payment under a property insurance policy filed in Michigan is due within thirty days after the receipt of proof the amount of loss.

and the bad faith was determined by a court of law. [Emphasis and footnote added.]

As an initial matter, we note that the parties dispute whether the defense, that the claim is reasonably in dispute, applies to all unpaid claims or only to third-party claims. Defendant contends that penalty interest may not be awarded when it is determined that *any* claim is reasonably in dispute, while plaintiff contends that penalty interest is automatically payable to first-party claimants upon a showing that benefits were paid late and that the reasonably in dispute defense only applies to third-party claims. In *Angott v Chubb Group Ins*, 270 Mich App 465, 479-480; ___NW2d ___ (2006), this Court, citing to *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 147-148; 594 NW2d 74 (1998) aff'd 462 Mich 896 (2000), held that an insurer which reasonably disputes the payment of a first party claim is not subject to penalty interest upon subsequently being required to pay the claim. Thus, defendant properly argues that it is not subject to penalty interest for its late payment of the remaining $144,877.26 of building damage coverage unless the claim was not reasonably in dispute.

Under the circumstances of this case, however, we find that the trial court did not err in concluding that the claim was not reasonably in dispute. While it was apparent from the plain language of the contract that defendant's and North American's policies did not share the same plan, terms, conditions and provisions, nevertheless, defendant unreasonably relied upon the coinsurance and "Loss Payable" clauses of its contract to deny full payment to plaintiff for its building loss. Because defendant misinterpreted the application of case law to its policy at its own risk, see, e.g. *Norgan v American Way Life Ins Co*, 188 Mich App 158, 165; 469 NW2d 23 (1991) (holding that plaintiff's claim was not reasonably in dispute and penalty interest was owed where the defendant, based on its misinterpretation of case law requiring clear and unambiguous language in insurance contracts, erroneously relied on contract language to reject plaintiff's claim), the trial court did not err in awarding penalty interest under MCL 500.2006(4).

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder